

FILED

NOT FOR PUBLICATION

JUN 2 2006

UNITED STATES COURT OF APPEALS

**CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS**

FOR THE NINTH CIRCUIT

JORGE SOTO VEGA,

Petitioner,

v.

ALBERTO R. GONZALES, Attorney
General,

Respondent.

No. 04-70868

No. A95-880-786

MEMORANDUM*

On Petition for Review of an Order of the
Board of Immigration Appeals

Submitted May 3, 2006**
Pasadena, California

Before: LAY,** KLEINFELD, and SILVERMAN, Circuit Judges.

Jorge Soto Vega, a native and citizen of Mexico, petitions for review of an
order by the Board of Immigration Appeals (“BIA”) that affirmed without opinion

* This disposition is not appropriate for publication and may not be
cited to or by the courts of this circuit except as provided by Ninth Circuit Rule
36-3.

** This panel unanimously finds this case suitable for decision without
oral argument. See Fed. R. App. P. 34(a)(2).

*** The Honorable Donald P. Lay, Senior United States Circuit Judge for
the Eighth Circuit, sitting by designation.

an Immigration Judge's ("IJ") denial of Soto Vega's applications for asylum, withholding of removal, and relief under the Convention Against Torture ("CAT"). We grant the petition and remand to the BIA.

We have jurisdiction to review a final order from the BIA under the Immigration and Nationality Act ("INA") § 242, 8 U.S.C. § 1252. When the BIA affirms an IJ's decision without opinion, this court reviews the IJ's decision as the final agency determination. Karouni v. Gonzales, 399 F.3d 1163, 1170 (9th Cir. 2005). "In this posture, we review de novo the IJ's legal conclusions." Reyes-Reyes v. Ashcroft, 384 F.3d 782, 786 (9th Cir. 2004). To establish eligibility for asylum, a petitioner must show he or she qualifies as a refugee. INA § 208(b), 8 U.S.C. § 1158(b). A refugee is one "who is unable or unwilling to return to . . . [his native] country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion" INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A). In Karouni, this court held that "all alien homosexuals are members of a 'particular social group'" for the purposes of determining refugee status. 399 F.3d at 1172.

At Soto Vega's merits hearing, the IJ found his testimony "essentially credible." The IJ then expressly stated he "believe[d] that the testimony of [Soto Vega] did demonstrate past persecution." However, the IJ went on to state that

Soto Vega “*must show* a clear probability that life or freedom would be threatened on account of his membership in this social group” (emphasis added). Once a petitioner has established past persecution, a rebuttable presumption exists that the petitioner has also established a well-founded fear of future persecution. Wang v. Ashcroft, 341 F.3d 1015, 1020 (9th Cir. 2003). The burden then shifts to the government to rebut the presumption by showing a fundamental change in country circumstances or that the petitioner could reasonably relocate to another part of his native country. Id.; see 8 C.F.R. § 208.13(b)(1)(i)(A), (B). Here, the IJ’s use of the phrase “must show” indicates the IJ did not afford Soto Vega the benefit of the presumption.¹ We therefore remand to the BIA in order to allow the agency to determine in the first instance whether the government has rebutted the presumption of a well-founded fear of future persecution. See I.N.S. v. Orlando Ventura, 537 U.S. 12 (2002).

For these reasons, we GRANT the petition for review and REMAND to the BIA.

¹We also note the IJ’s statement that Soto Vega must show by “a clear probability” that his “life or freedom would be threatened on account of his membership in this social group” misstated the proper burden of proof for an asylum analysis. The “clear probability” standard applies to withholding, rather than to asylum, which requires only a showing of a reasonable possibility. Compare 8 C.F.R. § 208.13(b)(2)(b), with § 208.16(b)(2).